No. 03-221

IN THE SUPREME COURT OF THE UNITED STATES

---

CHERYL K. PLILER, Warden of California State Prison - Sacramento
*Petitioner*,

vs.

RICHARD HERMAN FORD, *Respondent*

---

**OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI**

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

LISA M. BASSIS
Cal. State Bar No. 87845
P.O. Box 691956
Los Angeles, California 90069
(323) 848-8733

Attorney for Respondent
Richard Herman Ford
CJA Appointment

## TABLE OF CONTENTS


Opposition To The Petition For A Writ Of Certiorari ..... 2

Statement Of The Case ..... 2

Reasons For Denying The Warden's Petition ..... 10

I. The Majority's Decision Does Not Present Any Issue Worthy Of Review By This Court. ..... 10

A. The Rights Advisements Adopted By The Majority Are Consistent With The Responsibilities That Attend A Federal Court's Assumption Of Jurisdiction Over A Habeas Petition Filed By A Pro Se Prisoner Litigant.. 10

B. The Procedure Adopted By The Court Does Not Promote The Improper Goal Of Stay And Abeyance. ..... 15

C. The Majority's Decision Comports With AEDPA's Purpose To Further The Principles Of Comity, Finality, And Federalism. ..... 20

D. Contrary To The Petitioner's Contention, The Majority's Decision Avoids Piecemeal Litigation And Facilitates Decision On The Merits. ..... 22

E. The Ninth Circuit's Decision In This Case Does Not Conflict With Precedent From Other Circuits. ..... 26

F. The Majority's Opinion Does Not Impose New And Unwarranted Burdens On The District Courts. ..... 30

II. The Ninth Circuits Interpretation Of Federal Rule Of Civil Procedure 15(c) Is Not Contrary To Law. ..... 34

Conclusion ..... 41

## TABLE OF AUTHORITIES

***Case Authorities***


*Adams v. Texas*, 448 U.S. 38 (1980) ..... 39

*Adams v. United States*, 155 F.3d 582 (2nd Cir.1998) ..... 33

*Anthony v. Cambra*, 236 F.3d 568 (9th Cir.2000) ..... 35, 36

*Bear v. Boone*, 173 F.3d 782 (10th Cir.1999) ..... 18

*Braden v. 30th Judicial Cir. Ct.*, 410 U.S. 484 (1973) ..... 21

*Brambles v. Duncan*, 330 F.3d 1197 (9th Cir.2003) ..... 19, 27, 31

*Burris v. Farley*, 51 F.3d 655 (7th Cir.1995) ..... 19

*Calderon v. Ashmus*, 523 U.S. 740 (1998) ..... 36

*Calderon v. United States District Court* (Taylor), 134 F.3d 981, 988-989 (9th Cir.), cert. denied, 525 U.S. 920 (1998) ..... 23

*Coleman v. Thompson*, 501 U.S. 722 (1991) ..... 22

*Darr v. Burford*, 339 U.S. 200 (1950) ..... 20

*Devino v. Duncan*, 215 F.Supp.2d 414 (S.D.N.Y.2002) ..... 29

*Dils v. Small*, 260 F.3d 984 (9th Cir.2001) ..... 37

*Duncan v. Walker*, 533 U.S. 167 (2001) ..... 16, 17, 18, 21, 23

*Eldridge v. Block*, 832 F.2d 1132 (9th Cir. 1987) ..... 13

*Ex Parte Royall*, 117 U.S. 241 (1886) ..... 11

*Ford v. California*, 508 U.S. 975 (1993) ..... 3

*Ford v. California*, 510 U.S. 838 (1993) ..... 3

*Freeman v. Page*, 208 F.3d 572 (7th Cir.2000) ..... 19, 37

*Galtieri v. Wainwright*, 582 F.2d 3489 (5th Cir. 1978) ..... 22

*Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) ..... 38

*Green v. White*, 223 F.3d 1001 (9th Cir.2000) ..... 36, 38

*Guillory v. Roe*, 329 F.3d 1015 (9th Cir. 2003 ..... 29

*Haines v. Kerner*, 404 U.S. 519 (1972) ..... 13





*Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001) ..... 19

*Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir.), cert. denied, 528 U.S. 963 (1999) .... 37

*Houston v. Lack*, 487 U.S. 266 (1988) ..... 12

*Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968) ..... 12

*Hughes v. Rowe*, 449 U.S. 5 (1980) ..... 13

*In re Gasery*, 116 F.3d 1051 (5th Cir.1997) ..... 38

*Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986) ..... 12

*James v. Pliler*, 221 F.3d 1074 (9th Cir. 2000) ..... 13

*James v. Pliler*, 269 F.3d 1124 (9th Cir. 2001) ..... 33

*Johnson v. State of California*, 207 F.3d 650 (9th Cir. 2000) ..... 13

*Jones v. Morton*, 195 F.3d 153 (3d Cir.1999) ..... 39

*Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003) ..... 19, 27

*Landgraf v. USI Film Products*, 511 U.S. 244 (1984) ..... 39

*Lonchar v. Thomas*, 517 U.S. 314 (1996) ..... 23

*Marsh v. Soares*, 223 F.3d 1217 (10th Cir.2000) ..... 38

*Mason v. Meyers*, 208 F.3d 414 (3d Cir.2000) ..... 33

*Morgan v. Bennett*, 204 F.3d 360 (9th Cir. 2000) ..... 18

*Neverson v. Bissonnette*, 261 F.3d 120 (1st Cir. 2001) ..... 38

*Newell v. Hanks*, 283 F.3d 827 (7th Cir.2002) ..... 19, 39

*Noll v. Carlson*, 809 F.2d 1446 (9th Cir.1987) ..... 13

*Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69 (1st Cir.2002) ..... 19, 21

*Nyland v. Moore*, 216 F.3d 1264 (11th Cir.2000) ..... 39

*O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) ..... 20

*Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002) ..... 19

*People v. Von Villas* (1992) 10 Cal.App.4th 201 ..... 2

*People v. Von Villas* (1992) 11 Cal.App.4th 175 ..... 3

*R. A. V. v. St. Paul*, 505 U.S. 377 (1992) ..... 39

*Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) ..... 12, 13

*Rodriguez v. Bennett*, 303 F.3d 435 (2nd. Cir.2002)..... 31
*Rose v. Lundy*, 455 U.S. 509 (1982) ..... 4, 11, 15, 20, 24, 25
*Sawyer v. American Federation of Government Employees, AFL CIO*, 180 F.3d 31 (2d Cir.1999)..... 13
*Smith v. Ratelle*, 323 F.3d 813 (9th Cir. 2003).....28, 29
*Sterling v. Scott*, 57 F.3d at 451 (5th Cir. 1995)..... 26
*Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir.1983) ..... 19
*Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001)..... 17
*United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925)..... 11
*United States v. Miller*, 197 F.3d 644 (3d Cir.1999) ..... 33
*United States v. Stanley*, 483 U.S. 669 (1987)..... 39
*United States v. Thomas*, 221 F.3d 430 (3d Cir.2000)..... 36
*Valerio v. Crawford*, 306 F.3d 742, 771 (9th Cir.2002) .....27, 31, 32
*Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.), cert. denied, 531 U.S. 944 (2000) ..... 37
*Victor v. Hopkins*, 90 F.3d 276 (9th Cir. 1996)..... 26
*Warren v. Garvin*, 219 F.3d 111 (2nd Cir.), cert. denied, 121 S. Ct. 404 (2000)28, 29, 30, 39
*Williams v. Taylor*, 529 U.S. 420 (2000)..... 23
*Witherspoon v. Illinois*, 391 U.S. 510 (1968)..... 40
*Withrow v. Williams*, 507 U.S. 680 (1993)..... 36
*Zarvela v. Artuz*, 254 F.3d 374 (2d Cir.2001) ..... 19, 21, 27, 29, 31, 40

***Statutory Authorities***

28 U.S.C. §2244(b)(2)(B)..... 24
28 U.S.C. §2242..... 35
28 U.S.C. §2244(b)(2)(A)..... 24
28 U.S.C. §2244(d)(1)(A..... 14



28 U.S.C. §2254 .....6, 11, 14, 15, 21, 22, 24, 25, 33
28 U.S.C. §2254(b)(1)(A)..... 11
28 U.S.C. §2254(b)(2)..... 15

***Court Rules***

Federal Rule of Civil Procedure, Rule 15 (a) .....14, 35
Federal Rule of Civil Procedure, Rule 15(c) .....34, 36, 38, 39
Federal Rrule of Civil Procedure, Rule 60(b).....28, 29
Rules Governing Section 2254, Rule 11 ..... 35

***Other Authorities***

James Wm. Moore et al., Moore's Federal Practice §15.19[1] (3d ed.1999) 36
U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995)..... 16

## OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Richard Herman Ford respectfully opposes the petition for a Writ of Certiorari filed by Cheryl K. Pliler, Warden of California State Prison – Sacramento and the Attorney General for the State of California (collectively, "the Petitioner").

## CONSTITUTIONAL PROVISIONS INVOLVED [1]

## STATEMENT OF THE CASE

On January 16, 1988, a jury convicted Richard Herman Ford and Anthony Von Villas in California Superior Court of conspiracy to commit first degree murder, two counts of attempted murder, robbery, conspiracy to commit robbery, three counts of robbery and three counts of assault with a firearm. Ford was also convicted of attempted administration of an intoxicating agent. (The "Loguercio case.") The trial court sentenced Ford to prison for thirty-six years to life. Ford appealed to the California Court of Appeal, which affirmed his conviction and sentence (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 274-275.) The California Supreme Court denied review on January 14, 1993. A Petition for Writ of Certiorari was denied by

[1] Ford adopts the "Opinion or Judgment Below", "Statement of Jurisdiction" and "Relevant Statutory Provisions" sections set forth in the Petitioner's Opening Petition.



this Court on June 14, 1993. (*Ford v. California*, 508 U.S. 975 (1993).) (App. B-2.)

On October 11, 1988, in a separate trial, Ford and Von Villas were found guilty of first-degree murder and conspiracy to commit murder. (The "Weed case.") The trial court sentenced Mr. Ford to life without the possibility of parole. Ford appealed to the California Court of Appeal, which affirmed his conviction and sentence. (See *People v. Von Villas* (1992) 11 Cal.App.4th 175; AER 33.) The California Supreme Court denied review on February 11, 1993. A Petition for Writ of Certiorari was denied by this Court on October 4, 1993. (*Ford v. California*, 510 U.S. 838 (1993).) (App. C-2.)

On April 19, 1997, several days prior to the expiration of AEDPA's limitations period, Ford filed in the United States District Court for the Central District of California, two pro se federal habeas corpus petitions with motions to stay the petitions containing exhausted grounds while he exhausted the then-unexhausted state claims. (App. B-2, C-2.)

In the respective cases, the magistrate judge issued an order which gave Ford the choice of either (1) dismissing the petition without prejudice and re-filing after exhaustion of the unexhausted claims or (2) dismissing the unexhausted claims and proceeding with only the exhausted claims. The

magistrate judge issued an order, however, in which he stated that the district court did not have the discretion to stay a mixed petition so that the motion to stay the proceedings was denied. Additionally, the order stated that Ford was to notify the court within approximately two and one-half weeks if he wanted to waive the unexhausted claims and proceed only on the exhausted claims. (App. D1-D2, E2-E4.)

Ford opted to have the respective petitions dismissed in order to exhaust his unexhausted claims. (App D2-D5, E2.) As a result, on August 5, 1997 in the Loguercio case, and on September 9, 1997, in the Weed case, the magistrate judge issued reports recommending that the district court dismiss Ford's respective habeas petition without prejudice because they were partially exhausted petitions under *Rose v. Lundy*, 455 U.S. 509, 522 (1982). (App. D2-D5, E7.) However, the district court did not inform Ford that the AEDPA one-year statute of limitations had expired during the pendency of his federal habeas petitions so that, if he chose to dismiss his federal petitions and returned to state court to exhaust all of his claims he would be time-barred when he attempted to re-file his federal claims. On September 11, 1997 (Loguercio) and October 14, 1997, (Weed), the district court adopted the magistrate's report and dismissed the petitions, purportedly without prejudice, albeit after the expiration of the AEDPA's



limitations period. (See Petition for Writ of Certiorari, hereafter "Pet." at p. 5; App. D2-D5, E7.)

On September 29, 1997 (Loguercio) and October 24, 1997, (Weed), Ford filed, pro se, respective habeas corpus petitions in the California Supreme Court challenging his respective state court convictions. On March 25, 1998, the California Supreme Court summarily denied review. Having exhausted his state remedies, Ford then returned to federal court on April 7, 1998 and filed, second pro se federal habeas corpus petitions challenging his respective convictions. (App. B1-B8, C1-C9.)

The state contended that the second petitions were time-barred under the AEDPA's one-year statute of limitations and moved to dismiss the respective petitions. The magistrate judge issued reports recommending that Ford's petitions be dismissed with prejudice as untimely under AEDPA. On July 22, 1998 (Loguercio) and on June 30, 1998 (Weed) the district court judge adopted the magistrate judge's reports and dismissed the respective petitions as time-barred. (*Ibid.*)

Ford filed a notice of appeal and applied for a certificate of appealability ("COA"). The district court denied that request, but the Ninth Circuit consolidated Ford's two cases, the Weed case and the Loguercio case, and granted his request for a COA on the question whether his federal

habeas petitions were timely under AEDPA's one-year statute of limitations, 18 U.S.C. §2254(d). (App. A21.)

On September 6, 1992, the Ninth Circuit filed an opinion in which it affirmed in part, vacated in part, and remanded with instructions. (App. A40.) In consideration of the authorities which recognize that the rights of pro se prisoner litigants require careful protection when highly technical requirements are involved, especially when enforcing those requirement might result in the loss of the opportunity to procedure to defend a lawsuit on the merits, the court held that before dismissing a pro se complaint, the district court was obliged to advise Ford of his options with respect to his mixed habeas petitions: to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims. The district court's failure to explain the procedural deficiency that precluded it from granting Ford's stay motions deprived Ford of a fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits. Thus, the district court's action constituted prejudicial error. (App. A4-A5.)

The district court further erred when it failed to inform Ford that, on the face of the complaints, he would be time-barred under AEDPA on all of



his claims if he either failed to amend his petitions or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims. When the district court gave Ford the option to dismiss his petitions and return to state court to exhaust his then-unexhausted claims, his time for filing new federal petitions had already expired by more than four months. As a result, the district court misled Ford by informing him that if he opted to dismiss the petitions to return to state court to exhaust his claims, the dismissal would be without prejudice. The court held that a district court, when informing a habeas petitioner of his options with respect to a petition containing both exhausted and unexhausted state claims, should alert the petitioner to the one-year limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA) and to the fact that a portion of that period has already elapsed. In this case, the district court's failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations deprived him of the opportunity to make a meaningful choice between the two options, and inevitably resulted in the subsequent dismissal of all of Ford's claims as time-barred. As such, the district court's failure to fairly or fully explain the consequences of the options it presented to Ford constituted prejudicial error. (App. A5.)

The court also held that if the district court had fairly and properly explained Ford's options to him, it would have been unlikely that his second

petitions would have been dismissed as time-barred. In order to ensure that Ford's rights were not unduly prejudiced as a result of the district court's errors it held that a pro se habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then, following the district court's erroneously legal statements, returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonably delay, may employ the amendment procedures of Federal Rule of Civil Procedure 15 to have the second petition relate back to and preserve the filing date of the improperly dismissed initial petition. Thus, the order dismissing the claims that were originally raised in Ford's initial federal habeas petitions and then re-filed in his second petitions as untimely had to be vacated and remanded to the district court for consideration on the merits. (App. A5-A6.)

Judge Silverman dissented, writing that requiring the district court to incorporate a warning about the statute of limitations when informing habeas petitioner of his options with respect to a mixed petition was tantamount to requiring the district judge to improperly act as the petitioner's legal advisor. (App. A6.)

The majority and dissenting options were amended on May 15, 2002. (App. A7-A13.) With the amendments, the panel voted to deny the



Warden's petition for panel rehearing and the suggestion for rehearing en banc. (App. A-13.)

The Ninth Circuit denied the Warden's petition for rehearing and the suggestion for rehearing en banc. (App. A13.) The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. (Fed. R. App. P. 35; App. A13.)

On May 28, 2003, the Warden's motion to stay the issuance of the mandate in the Ninth Circuit pending its decision to file for a writ of certiorari was granted.

## REASONS FOR DENYING THE WARDEN'S PETITION

### I. THE MAJORITY'S DECISION DOES NOT PRESENT ANY ISSUE WORTHY OF REVIEW BY THIS COURT.

#### A. The Rights Advisements Adopted By The Majority Are Consistent With The Responsibilities That Attend A Federal Court's Assumption Of Jurisdiction Over A Habeas Petition Filed By A Pro Se Prisoner Litigant.

Although the Petitioner concedes Ford was entitled to delete the unexhausted claims from his petition rather than suffer a dismissal, it contends he was *not* entitled to be apprised of his options with respect to his mixed habeas petitions, or to be warned about the AEDPA's limitation period before the mixed petition was dismissed. (Petition at p. 8, App. A15, A25.) Such warnings it vigorously argues, would "institutionalize[] a stay and abeyance procedure of dubious merit," impose[] new and onerous burdens on district courts in connection with the dismissal of mixed habeas petitions and [would] clash[] with the holdings of other federal appellate courts. (Pet. at p. 8.) None of these contentions has merit.

The "exhaustion" doctrine has long been one of the pillars of federal habeas corpus jurisprudence. (*See, e.g., United States ex rel. Kennedy v.*



*Tyler*, 269 U.S. 13, 17-19 (1925); *Ex Parte Royall*, 117 U.S. 241, 251 (1886).) Under the present- day codification of that doctrine, habeas relief is not available "unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ." (28 U.S.C. §2254(b)(1)(A).) In *Rose v. Lundy*, *supra*, 455 U.S. 509, this Court addressed the proper method for disposing of habeas petitions containing both exhausted and unexhausted claims. The Court adopted a rule of "total exhaustion" and directed that "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." (*Id.* at 510.)

Consonant with *Rose*, the district court afforded Ford two options: *first,* it allowed Ford to dismiss the petition without prejudice and to re-file the petition after exhaustion of the unexhausted claims or *second*, to amend his mixed petition to delete the unexhausted claims. However, as explained by the majority, simply apprising Ford of the option to amend without also apprising him it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims, and to the fact that a portion of the one-year limitations period of

AEDPA had already elapsed, deprived him of the opportunity to make a "meaningful" choice between the two options. (App. A29.)[2]

The "unique handicaps of incarceration" (*Jacobsen v. Filler*, 790 F.2d 1362, 1364, n. 4 (9th Cir. 1986) faced by pro se prisoner litigants have long been recognized by the courts. (*Hudson v. Hardy*, 412 F.2d 1091, 1094-1095 (D.C. Cir. 1968).) The realities of incarceration include that prisoners are not at liberty to seek out representation, they are limited in their ability to seek out evidence and information they need in order to litigate, they are restricted in their access to legal materials and their "confinement makes compliance with procedural deadlines difficult." (*Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998).) "Unskilled in law, unaided by counsel, and unable to leave the prison" incarcerated pro se litigants have little control over litigation. (*Houston v. Lack*, 487 U.S. 266, 271 (1988).)

It is for these reasons this Court has held that pro se litigants are entitled to certain procedural protections. Pro se pleadings are held to less

---

2 Paraphrasing the dissent, the Petitioner asserts that since Ford did not opt to have both petitions dismissed without prejudice before returning to state court to exhaust his remaining claims, the district court complied with the dictates of *Rose*: it "did exactly what it was supposed to do: . . . dismiss Ford's mixed petition[s] without prejudice." (Pet. at p. 10; App. A-40.) While Mr. Ford may not have *expressed* a choice, he certainly *exercised* one; he allowed his petitions to be dismissed without prejudice. As the majority recognized, the fact he failed to verbalize his choice elevates form over substance; the gravamen of the error here is that he did so out of ignorance. (App. A25-26, 27-28.)



stringent standards than those prepared by counsel (*Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) (per curiam); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (per curiam); *Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); App. A24). With respect to pro se pleadings, courts have held that before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively, (*Noll v. Carlson, supra*, 809 F.2d at 1448-1449; *James v. Pliler*, 221 F.3d 1074, 1077 (9th Cir. 2000)) and an opportunity to correct them unless amendment would be futile. (*Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir. 1987).) In a context less fraught with obscure procedural perils than habeas corpus, an incarcerated pro se litigant must be given fair notice of the ramifications of summary judgment and the requirements for opposing it. (*Sawyer v. American Federation of Government Employees, AFL CIO*, 180 F.3d 31, 34 (2d Cir.1999); *Rand v. Rowland*, supra, 154 F.3d at 958.)

The court adopted the fair notice/summary judgment rule in *Rand* because it recognized that summary judgment concepts and principles can be difficult, that the consequence of summary judgment is "drastic," and that incarcerated pro se litigants suffer unique hardships of incarceration. (*Id.* at

pp. 956-959.) "We believe that the twin infirmities of imprisonment and proceeding without counsel, which provided the basis for the creation of the fair notice rule, remain solid grounds for the rule's retention and its restriction to this class of litigants." (*Id.* at p. 958.)

This rule takes on a special urgency in the habeas review context. Under AEDPA, state prisoners have only one year from the date their convictions become final to file a petition for federal habeas review. (28 U.S.C. §2244(d)(1)(A).) As the majority recognized, to dismiss a petition without explaining the procedural deficiency would be contrary to and inconsistent with the protections accorded pro se litigants in view of the statute of limitations and complex procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 under prevailing decisional law. (App. A24; *James v. Pliler, supra*, 269 F.3d at 1126.)

Under the Petitioner's approach, a prisoner's opportunity to amend a §2254 petition would thus depend on his awareness of the existence of that alternative or on a sympathetic district judge who informs him of the option and permits the amendment. (See Fed.Rule Civ.Proc.§15(a).) Not only would this result in inconsistent access to the courts, it would be contrary to the imperatives that attend a district court with respect to pro se litigants.



**B. The Procedure Adopted By The Court Does Not Promote The Improper Goal Of Stay And Abeyance.**

Indifferent to the fact Ford was uninformed (Pet. at p. 9), the Petitioner argues at length that the advisement required by the Court "promotes the improper goal of stay and abeyance," undermines the policy of comity underlying the exhaustion doctrine, and will lead to piecemeal habeas litigation. (Pet. at pp. 9-10.) As to these contentions, there also is no merit.

Nothing in the procedure approved by the court "circumvents the AEDPA's limitations period". (See Pet. at p. 10.) Although the Court's pre-AEDPA decision in *Rose v. Lundy, supra*, 455 U.S. at 522, prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, petitioner offers no reason and none exists why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Certainly, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U.S.C. §2254(b)(2), particularly in an instance such as this where the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period. Indeed, this

Court has concluded that in such circumstances a stay is preferable, *see Duncan v. Walker,* 533 U.S. 167, 183 (2001) (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment) ["[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies."], and, as the majority in the present case concluded is the only appropriate course in cases like Ford's where an outright dismissal could jeopardize the timeliness of a collateral attack.

This is not a matter of pyrrhic concern. A Justice Department study cited by this Court indicates that 63% of all habeas petitions are dismissed, and 57% of those are dismissed for failure to exhaust state remedies. (See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995), cited in *Duncan v. Walker, supra*, 533 U.S. at p. 184, Breyer, J., with whom Ginsberg, J., joins, dissenting). And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. (*Id.,* at 186, [of all habeas petitions, nearly half were pending in the district court for six months or longer; 10% were pending more than two years.].) Because there is no statutory tolling of AEDPA's limitations period during the pendency of



federal habeas petitions (*Tillema v. Long*, 253 F.3d 494, 503-504 (9th Cir. 2001)), a large group of federal habeas petitioners, seeking to return to federal court after subsequent state-court rejection of an unexhausted claim, can find their claims time barred. Moreover, because district courts vary substantially in the time they take to rule on habeas petitions, two identically situated prisoners can also receive opposite results. If Prisoner *A* and Prisoner *B* file mixed petitions in different district courts six months before the federal limitations period expires, and the court takes three months to dismiss Prisoner *A*'s petition, but seven months to dismiss Prisoner *B*'s petition, Prisoner *A* will be able to return to federal court after exhausting state remedies, but Prisoner *B*--due to no fault of his own--may not. (*Duncan v. Walker, supra,* 533 U.S. at p. 186, Breyer, J., with whom Ginsberg, J., joins, dissenting.)

In addition, despite the Petitioner's suggestion that a stay of exhausted claims pending the complete exhaustion of state remedies would undermine the "purposes" of AEDPA, nothing precludes a federal court from staying exhausted claims pending exhaustion of state remedies as a matter of equity. In a concurring opinion in *Duncan,* Justice Stevens wrote that "neither the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period

tolled . . . as a matter of equity." (*Duncan v. Walker, supra*, 533 U.S. at 183 (Stevens, J., concurring).)

The question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law, see *post,* at 2134 (Breyer, J., dissenting), but also for district courts, see, *e.g., Morgan v. Bennett*, 204 F.3d 360, 369-371 (9th Cir. 2000) [disagreeing with District Court's conclusion that claim had not been exhausted]; *Bear v. Boone*, 173 F.3d 782, 784-785 (10th Cir.1999) [same].) Justice Stevens indicated that in his view, equitable considerations may make it appropriate to "conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." (*Id.* at p. 184 (Stevens, J., concurring).) Thus, a federal court is free to conclude that a stay is appropriate for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA but files a mixed petition. As a result, equitable considerations make it appropriate for federal courts to stay exhausted claims in a federal habeas petition, pending state exhaustion.

Moreover, contrary to the Petitioner's contention, permitting a pro se prisoner litigant to present the initially unexhausted (but now exhausted)



claims is also consistent with the decisions of the circuit courts. Indeed, there is a "growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review." (*Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir.2002); and see *Zarvela v. Artuz*, 254 F.3d 374, 380-383 (2d Cir.2001) cert. denied, 534 U.S. 1015 (2001)] [holding that "[a]lthough a district court would generally have discretion whether to stay the exhausted claims of a mixed petition or dismiss the entire petition, outright dismissal was not appropriate for Zarvela because, with so little time remaining on his statutory one-year limitations period, a complete dismissal 'jeopardize[d] the timeliness of a collateral attack.' "] quoting *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir.2000)) cert. denied, 531 U.S. 946 (2000); *Newell v. Hanks*, 283 F.3d 827, 834-35 (7th Cir.2002) (same)] and see *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003); *Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir.2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Hasan v. Galaza*, 254 F.3d 1150, 1152 n.2 (9th Cir. 2001); *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir.1995); *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir.1983)).

**C. The Majority's Decision Comports With AEDPA's Purpose To Further The Principles Of Comity, Finality, And Federalism.**

Nor does the majority's approach undermine considerations of comity. (Pet. at pp. 10-11.) The exhaustion requirement "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." (*Rose v. Lundy, supra*, 455 U.S. at 518.) The exhaustion rule promotes comity in that " 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.' " (*Ibid.* quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950); see also *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ["Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief"].) Since principles of comity and judicial economy mandate dismissal of any *unexhausted* claims, (*see Rose v. Lundy, supra*, 455 U.S. at pp. 518-520), contrary to the Petitioner's contention, those principles are not applicable to Ford's exhausted claims, since the state courts already had an opportunity to consider those issues raised in his mixed federal petition.



Further, there is a strong preference for a stay under these circumstances. As the Second Circuit explained in *Zarvela v. Artuz, supra,* 254 F.3d at 382-383, "[s]taying the exhausted claims would be a traditional way to 'defer' to another court 'until' that court has had an opportunity to exercise its jurisdiction over a habeas petitioner's unexhausted claims." (*Id.;* see also *Duncan v. Walker, supra*, 533 U.S. at 182-183 (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment); see also *Nowaczyk v. Warden, N.H. State Prison, supra*, 299 F.3d at p. 79.)

Because the claims presented in Ford's §2254 petition were fully exhausted and properly before the district court, and dismissal would have jeopardized Ford's ability to obtain federal review, dismissal was "inconsistent with the imperative that underscores all habeas corpus proceedings: ensuring that federal constitutional claims may be reviewed promptly in a federal forum if State remedies have been exhausted." (See *Braden v. 30th Judicial Cir. Ct.*, 410 U.S. 484, 490 (1973) [explaining that the exhaustion doctrine reflects "a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement"] (internal quotation marks omitted)).

Under the majority's construction, a stay advances the policy of comity underlying the exhaustion doctrine by facilitating state review on the merits of the unexhausted claims, thus giving those courts the opportunity to review all claims of constitutional error. (*Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ["This exhaustion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights."].) Thus, contrary to the Petitioner's argument, the majority's view counsels in favor of, not against the principles of comity discussed in *Rose* by "defer[ring] to the state court action" as to unexhausted claims.

**D. Contrary To The Petitioner's Contention, The Majority's Decision Avoids Piecemeal Litigation And Facilitates Decision On The Merits.**

Another federal interest mentioned by the Petitioner is the avoidance of piecemeal litigation and encouraging a prisoner to bring all challenges to his state-court conviction in one §2254 proceeding, lest it "prolong the litigation unduly and thus delay the execution of judgment." (Pet. at p. 11; *Galtieri v. Wainwright*, 582 F.2d 348, 369 (5th Cir. 1978) (en banc) (dissenting opinion); *In re Blodgett*, 502 U.S. 236, 239 (1992).)



Even if it could be said that the Petitioner's view accurately reflects reality, as discussed above, "nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies" (*Duncan v. Walker, supra*, 533 U.S. at 182 (Souter, J., concurring) see also *id.* at 182-183 (Stevens, J., concurring).) It is doubtful that Congress intended to give state prisoners less than a full year (plus the duration of state collateral proceedings) to file a federal habeas corpus petition or perhaps erase the right altogether, and "den[ying] the petitioner the protections of the Great Writ entirely," (*Lonchar v. Thomas*, 517 U.S. 314, 324 (1996)) simply because the technical nature of the habeas rules led to the filing of a mixed petition. The majority's decision thus comports with "AEDPA's purpose to further the principles of comity, finality, and federalism." (See *Williams v. Taylor*, 529 U.S. 420, 436 (2000).) Specifically, it promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments.

Further, subsequent petitions that meet the "abuse of the writ" standard have always been subject to dismissal, irrespective of the Court's treatment of mixed petitions. (See *Calderon v. United States District Court* (Taylor), 134 F.3d 981, 988-989 (9th Cir.) [amendment of petition to add newly-exhausted claims entails risk that new claims could be barred as an abuse of the writ], cert. denied, 525 U.S. 920 (1998); and see 28 U.S.C.

§2244(b)(2)(A) [requiring a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"]; §2244(b)(2)(B) [requiring new evidence establishing that, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"].) A rule which would preclude a district court from retaining jurisdiction pending complete exhaustion, therefore provides no additional incentive whatsoever to consolidate all grounds for relief in one §2254 petition. In contrast, the resultant loss to a pro se prisoner of the ability to litigate a timely filed habeas petition pending in district court would be severe and irremediable.

> "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. 'The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.' [(]Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95, 19 L.Ed. 332.[)] Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." ." *Brown v. Allen*, 344 U.S. 443, 512, 73 S.Ct. 397, 448, 97 L.Ed. 469 (opinion of Frankfurter, J.)

(*Rose v. Lundy, supra*, 102. S.Ct. at p. 1218, fn. 16 (opinion of Stevens, J. dissenting).)



In the words of Justice Stevens in *Rose v. Lundy, supra*, 102 S. Ct. at pp. 1119-1120, the "total exhaustion" rule advocated by the Petitioner demeans the high office of the great writ.

> "Perhaps a rule of this kind would be an appropriate response to a flood of litigation requesting review of minor disputes. An assumption that most of these petitions are groundless might be thought to justify technical pleading requirements that would provide a mechanism for reducing the sheer number of cases in which the merits must be considered. But the Court's experience has taught us not only that most of these petitions lack merit, ***but also that there are cases in which serious injustice must be corrected by the issuance of the writ***. In such cases, the statutory requirement that adequate state remedies be exhausted must, of course, be honored. When a person's liberty is at stake, however, there surely is no justification for the creation of needless procedural hurdles."

(Emphasis and italics added.)

With only slight adjustments for the specific nature of the issue here, Justice Steven's statement is on point. Instead of deterring the sophisticated habeas petitioner who understands, and wishes to circumvent, the rules of exhaustion, the result advocated by the Petitioner will serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison. No doubt he will consolidate all conceivable grounds for relief in an attempt to accelerate review and minimize costs. But, under the Petitioner's approach, if he unwittingly includes in a §2254 motion a claim not yet presented to the state courts, he risks dismissal of the entire petition

with the resultant forfeiture of federal habeas review. Adopting a procedure which permits the district court to stay exhausted claims while exhausting his state court remedies fulfills the purposes of the writ. The decision of the majority does not conflict with but instead effectuates the mandate of this Court by insuring a petitioner proceeding pro se does not lose the opportunity to have *all* of his claims heard on the merits.

**E. The Ninth Circuit's Decision In This Case Does Not Conflict With Precedent From Other Circuits.**

In its attempt to manufacture an intercircuit dispute, the Petitioner contends the majority's decision conflicts with the decisions of at least two other circuit courts of appeals, *Victor v. Hopkins*, 90 F.3d 276 (9th Cir. 1996), and *Sterling v. Scott*, 57 F.3d at 451, 453 (5th Cir. 1995).) The Petitioner does not and can not to explain how they are inconsistent, as examination proves no such conflict exists.

In *Rose*, this Court ruled that a habeas court can not proceed to adjudicate a mixed petition. In *Victor* the Eighth Circuit held, consonant with *Rose*, that district courts lack authority to hold mixed petitions in abeyance (*id.* at 282), and in *Scott*, with citations to *Rose*, the Fifth Circuit upheld the district court's dismissal of a mixed habeas petition in a capital case. Similarly, the majority in *Ford*, explicitly recognized that a district



court must dismiss a habeas petition containing unexhausted claims. (Opn. A-22.) As the majority's decision has nothing to do with the discretion of a district court to hold in abeyance a *mixed* habeas petition pending exhaustion of state remedies, the Petitioner has not and cannot demonstrate any inconsistency with *Victor* or *Sterling* sufficient to warrant issuance of a writ of certiorari. (Pet. at pp. 11-12.)

Nor is it true, as the Petitioner contends, that no court other than *Ford* has ever held a district court must advise a habeas petition that his federal claims may be time-barred absent equitable tolling. (Pet. at p. 13.) The Second Circuit held in *Zarvela*, a case in which the AEDPA period had not yet run, the district court when informing a habeas petitioner of his options with respect to a mixed petition must "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. (*Zarvela v. Artuz, supra*, 254 F.3d at 382.) In *Valerio v. Crawford*, 306 F.3d 742, 771 (9th Cir.2002), an en banc panel of the Ninth Circuit held that when dismissal could jeopardize claims potentially barred by AEDPA's statute of limitations, the district court is obliged to notify the petitioner in order to guarantee the fully informed exercise of his rights. (*Ibid.*; see also, *Kelly v. Small, supra*, 315 F.3d at 1070 [same].) Similarly, in *Brambles v. Duncan, supra*, 330 F.3d 1197, the Ninth Circuit found it was error to dismiss a mixed petition where the district court failed to inform the

pro se Brambles that the dismissal of his first petition, although ostensibly without prejudice, would effectively be with prejudice unless he could establish that the limitations period was equitably tolled. (*Id.* at p. 1202-1203; see also *Smith v. Ratelle*, 323 F.3d 813, 820-824 (9th Cir.2003) [finding equitable tolling warranted where district court dismissed prior timely mixed petition without providing opportunity to delete unexhausted claims and gave misleading information that failed to inform petitioner that any new petition would be untimely].)

Nor is the majority's decision inconsistent with *Warren v. Garvin*, 219 F.3d 111 (2nd Cir.), cert. denied, 121 S. Ct. 404 (2000), as the Petitioner contends. In *Warren* the Second Circuit held that if the district court errs in its dismissal of a mixed petition, relief under Rule 60(b), of the Federal Rules of Civil Procedure is not available where the petitioner fails to act with the requisite diligence in pursuing his claims in state court and returning to federal court following voluntarily dismissal of his petition. (*Id.* at 113-114.) Since the petitioner in *Warren* did not timely pursue his state remedies, the court properly declined to apply the provisions of Rule 60(b) to petitioner's previously filed habeas corpus application.

*Warren* stands for nothing more than the general rule of diligence. "[T]he relevant measure of diligence is how quickly a petitioner sought to



exhaust the claims dismissed as unexhausted, and how quickly he returned to federal court after doing so." (*Guillory v. Roe*, 329 F.3d 1015, 1018 n. 1 (9th Cir. 2003) [indicating thirty days is sufficient time to return to state court, and thirty days is sufficient time to return to federal court after state court action final); see also *Smith v. Ratelle*, *supra*, 323 F.3d at pp. 815, 819 [ninety-three days assumed [but not decided] to be reasonably diligent]; *Warren v. Garvin*, *supra*, 219 F.3d at pp. 114-115.) In reliance on *Warren*, the Second Circuit in *Zarvela* provided a stay only where "entry to the state courts and return [to federal court] occurred promptly." (*Zarvela v. Artuz*, *supra*, 254 F.3d at pp. 382-383; see, e.g., *Devino v. Duncan*, 215 F.Supp.2d 414, 418 (S.D.N.Y.2002).) *Ford*, in turn, cited *Zarvela* for the propositon that the return from federal court after a state collateral challenge must be prompt in order to satisfy the conditions of a stay. (App. A34; *Zarvela v. Artuz, supra*, 254 F.3d at p. 383.) The majority's decision thus merely affirms that which is axiomatic under *Warren*, that state remedies must be expeditiously pursued where the pro se petitioner is seeking to satisfy conditions pursuant to a stay (App. A34; *Zarvela v. Artuz, supra*, 254 F.3d at 383; *Guillory v. Roe, supra*, 329 F.3d at 1018), or, as in the case of *Warren*, seeks to re-open a previously dismissed petition pursuant to Federal Rule of Civil Procedure, Rule 60(b)(6). (*Warren v. Garvin, supra*, 219 F.3d at 114-

115.) Hence, the Petitioner can show no inconsistency to warrant a writ of certiorari.

**F. The Majority's Opinion Does Not Impose New And Unwarranted Burdens On The District Courts.**

According to the Petitioner, the decision reached by the majority constitutes an unwarranted expansion of existing decisional law. By requiring district courts to inform habeas petitions that their federal claims may be time-barred "if [they] opt[ ] to dismiss the petitions 'without prejudice' and return to state court to exhaust all of their claims, it contends that the majority has visited burdens of unparalleled complexity upon the district court. Not only would the district court be required to dispense correct legal advise regarding the applicability of the statute of limitations, it complains, it also would be required to calculate the limitations deadline, a task which likely would require resort to documents which rarely accompany the petition in order to calculate the limitations period. (Pet. at p. 13; App. A42.)

In its apparent zeal to establish error worthy of certiorari, the Petitioner has grossly mischaracterized the holding reached by the majority. The majority merely requires the district judge to notify a pro se plaintiff of the existence of the AEDPA limitation and the fact part or all of the period,



whichever is the case, has already run, a relatively simple task. (App. A28-30, fn. 8; and see *Brambles v. Duncan*, *supra*, 330 F.3d at pp. 1199-1200.) "This simple step helps avoid the unnecessary forfeiture of petitioners' constitutional rights." (App. A-28.)

Other circuits have noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred, and require similar advisements. (*Rodriguez v. Bennett*, 303 F.3d 435 (2nd. Cir.2002).) In *Rodriguez*, the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, the 'without prejudice' provision was an illusion; petitioner could never succeed in timely re-filing the petition because he would already be time-barred.' (*Id.* at p. 439.) In *Valerio v. Crawford*, *supra*, 306 F.3d 742, the en banc court instructed the district court to inform a petitioner when claims to be dismissed 'without prejudice' would actually be time-barred. In *Zarvela*, a case in which the AEDPA period had not yet run, the Second Circuit held that a district court, when informing a habeas petitioner of his options with respect to a mixed petition should "alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. (*Zarvela, v. Artuz, supra*, 254 F.3d at p. 382; App. A28-29.) Here, the failure to alert Ford to the current status of his claim under the AEDPA one-year statute of limitations clearly deprived him of the

opportunity to make a "meaningful" choice between the two options. (*Valerio v. Crawford, supra*, 306 F.3d at pp. 770-771.)

While Judge Silverman opined a myriad of factors could and likely would affect a petitioner's decision regarding how to proceed, (see Pet. at p. 13, App. A43 (Silverman, J., dissenting)), the majority's decision does not require a district judge to advise a pro se petitioner how to proceed. Nor does it require a district court judge to advise a pro se petitioner about every possible factor that could affect his decision or require the district judge to calculate the limitations period. It also does not turn the district court into the petitioner's paralegal or "blurs the distinction between impartial decision-making and advocacy." (Pet. at p. 13.) It merely requires the district court to inform a pro se habeas petitioner of the existence of the AEDPA one-year limit and the fact that a portion of that period has already lapsed; a relatively simple task. (App A-29, fn. 8.) Given the important legal interests at stake, this is hardly sisyphean, let alone burdensome.

As even the most seasoned of lawyers knows, AEDPA is a confusing, at times impenetrable statute. It imposes stringent procedural rules on habeas petitioners, with often harsh results. To alleviate the burden on pro se litigants, the Ninth Circuit has followed the Second and Third Circuits in requiring district courts to provide mandatory prophylactic "notice"



measures to advise pro se petitioners of the consequences of certain AEDPA procedural provisions that may foreclose consideration of their claims on the merits. (*See Adams v. United States*, 155 F.3d 582, 584 (2nd Cir.1998) (per curiam) [mandatory warning regarding consequences of "second or successive petition" rule when recharacterizing motions under §2255]; *United States v. Miller*, 197 F.3d 644, 646, 652 (3d Cir.1999) (same), *Mason v. Meyers*, 208 F.3d 414, 418 (3d Cir.2000) (same, under §2254).) The Ninth Circuit already requires the district judge to inform a pro se habeas petitioner that he has the option of dismissing the mixed petition without prejudice and returning to state court to exhaust the then-unexhausted claims. (*James v. Pliler*, 269 F.3d 1124, 1125-1126 (9th Cir. 2001).) The decision reached by the majority does nothing more than insure that those options are accurately explained: that the district court judge must inform the petitioner if, on the face of the complaint, the AEDPA statute of limitations has expired such that any dismissal of the mixed petition would necessarily be "with prejudice," absent equitable tolling. (App. A29, fn. 8.) Anything less, would affirmatively mislead the pro se petitioner about the options available to him. (*Ibid.*) That however, might be precisely the Petitioner's objective.

Under the Petitioner's approach, if a pro se prisoner litigant unwittingly includes in a §2254 motion a claim not yet presented to the state

courts, he risks dismissal of the entire petition without being apprised of his available options. A prisoner's opportunity to amend a §2254 petition would thus depend on his awareness of technical requirements or run the risk of outright dismissal, which would render it unlikely or impossible to pursue a timely collateral attack. The decision of the majority simply prevents the state from exploiting a *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison through federal review by requiring compliance with certain minimal safeguards. Under the circumstances, it is difficult to see what all the fuss is about.

## II. THE NINTH CIRCUITS INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(c) IS NOT CONTRARY TO LAW.

Based on a tortured interpretation of existing precedent, the Petitioner now contends certiorari should be granted because the majority's interpretation of the "relation back doctrine" is contrary to rule 15(c) of the Federal Rules of Civil Procedure, circumvents the AEDPA's one-year limitations period, and is inconsistent with decisions of at least six other circuit courts of appeals. None of these contentions has merit.

The Petitioner insists that Rule 15(c) cannot apply to habeas corpus cases in light of AEDPA, because allowing relation back of otherwise time-



barred claims is inconsistent with the legislative intent that the rules would have very limited application to habeas corpus proceedings and to Rule 15(c) in particular. (Pet. At p. 16.)

Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners such as Ford may find themselves time-barred when they attempt to resubmit their claims to the district court. (See *Anthony v. Cambra*, 236 F.3d 568, 573 (9th Cir.2000).)

There is no question that Rule 15(a) applies to habeas corpus actions with the same force that it applies to garden-variety civil cases. 28 U.S.C. §2242 states that applications for habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Similarly, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts states that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." The Petitioner has cited to no authority that supports the proposition that AEDPA

renders Rule 15 inapplicable to federal habeas corpus proceedings, and there is substantial authority to the contrary. (See e.g. *Withrow v. Williams*, 507 U.S. 680, 696 n. 7 (1993); *Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) [under Habeas Rule 11, and unless otherwise expressly governed by statute, habeas corpus amendments are governed by Rule 15]; *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir.2000) [holding that Rule 15(c) applies to post-AEDPA §2255 petitions]; *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir.2000) [applying Rule 15(c) to post-AEDPA habeas petition and holding that amended pleading related back to original timely pleading].) As held in *Anthony v. Cambra, supra*, 236 F.3d at p. 576, there is no inconsistency between AEDPA's statute of limitations and Rule 15(c)'s amendment regime where, as here, the state is on notice of the claims to be raised; as explained by a leading treatise: Moore, "[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitation requires." (James Wm. Moore et al., Moore's Federal Practice §15.19[1] (3d ed.1999).)

Nor is this case at all inconsistent with *Green v. White*, 223 F.3d 1001, 1003 (9th Cir.2000), as the Petitioner contends. (Pet at p. 17.) There, the court held that a second habeas petition does not relate back to a first habeas



petition when the first habeas petition was dismissed for failure to exhaust state remedies (*see also, e.g., Dils v. Small*, 260 F.3d 984, 986 (9th Cir.2001); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir.), cert. denied, 531 U.S. 944 (2000); *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir.) [holding that when a second habeas petition is filed following the dismissal without prejudice of a prior habeas petition for failure to exhaust, there is no pending petition to which the new petition "could relate back or amend")], cert. denied, 528 U.S. 963 (1999).)

However, what the Petitioner fails to mention, and was undeniably central to the majority's holding that *Green* was distinguishable, was the fact that in *Anthony v. Cambra, supra*, 236 F.3d 568, the Ninth Circuit carved out an exception to its earlier holdings, in instances where the district court has dismissed an earlier "mixed" petition without affording habeas litigants with the opportunity to amend their mixed petitions by striking their unexhausted claims . . ." (App. A-32, and see fn. 11-12; *id.* at 574; see also *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir.2000) [dismissal of mixed federal petition "is not proper when that step could jeopardize the timeliness of a collateral attack"]; *Henry v. Lungren, supra*, 164 F.3d at p. 1241, [an untimely petition may "relate back" to an earlier petition under Fed.R.Civ.P. 15(c)(2) where a district court impliedly retains jurisdiction].) Thus, this case is easily distinguishable from the Ninth Circuit's decision in *Green v.*

*White, supra*, 223 F.3d 1001, which precluded employment of Federal Rule of Civil Procedure, Rule 15(c) to treat a later petition as "relating back" to the filing date of an earlier petition which had been ***properly*** dismissed..

Moreover, other circuits have held that a habeas application filed after a previous application was dismissed for non-exhaustion is a "continuation" of the earlier application. (See *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir.1997) (per curiam); *Graham v. Johnson*, 168 F.3d 762, 775-781 (5th Cir. 1999).) Thus, the Petitioner is incorrect when it states that no court other than *Ford* has held that an untimely habeas petition can relate back to a prior habeas petition that has been dismissed. (Pet. at p. 17.)

The Petitioner contends that a number of other circuits have addressed the specific relation-back issue presented here, namely, whether the relation back doctrine applies to a former habeas proceeding. These circuits have held that Rule 15(c) does not apply where the party bringing suit did not seek to "amend" his original pleading, but, rather, allowed the first petition to be dismissed and then later opted to file a new petition at a subsequent date. (*Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001); *Marsh v. Soares*, 223 F.3d 1217, 1219 (10th Cir.2000) [holding "relation back" doctrine inapplicable when initial habeas petition had been dismissed because there was no pleading to which the new petition could relate back];



*Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir.2000) [same]; petition containing an entirely new claim does not relate back to the original filing date; and see *Newell v. Hanks*, *supra*, 283 F.3d at 834; *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir.2000); *Jones v. Morton*, 195 F.3d 153, 160-161 (3d Cir.1999).)

As the holding in this case concerns whether a pro se prisoner litigant could employ the relation-back doctrine to have the second petition relate back to and preserve filing date of the ***improperly***-dismissed initial petition, the above-cited cases which concerned an entirely different question concerning the amendment procedures of Federal Rule of Civil Procedure 15(c) are not at all applicable. As this Court has stated in the past, cases are not authority, of course, for issues not raised and resolved. (*Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1984) ["the 'maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used' "]; *R. A. V. v. St. Paul*, 505 U.S. 377, 386, fn. 5 (1992) [it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"]; *United States v. Stanley*, 483 U.S. 669, 680 (1987) ["no holding can be broader than the facts before the court"]; *Adams v. Texas*, 448 U.S. 38, 45, fn. 3 (1980) [issue of applicability of *Witherspoon v.*

*Illinois*, 391 U.S. 510, 519 (1968) to Texas death qualification process not foreclosed by that decision "because the issue was not explicitly raised in that case."]) As the present issue was not discussed or raised in any of the cases cited by the Petitioner, the Petitioner cannot demonstrate any conflict among the circuits to justify review.

The majority's decision was expressly animated by concerns for protecting the ability of a pro se petitioner to present the constitutional challenges to his conviction. (App A31, citing *Zarvela v. Artuz*, 254 F.3d 374, 382-383 "[a] pro se litigant should [not] lose his opportunity to present his constitutional challenge to his conviction.") The majority's decision is thus consistent with existing decisional law.

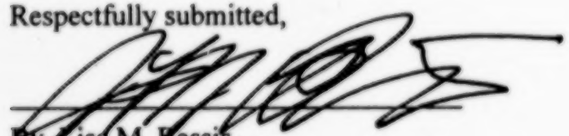
In sum, the Ninth Circuit's decision is wholly consistent with this Court's precedent. Faced with this well-established precedent, the Petitioner simply seizes out-of-context cases in an attempt to create issues where none exist. This Court should see through this transparent attempt to establish an inter-circuit disparity and deny the petition.



## CONCLUSION

Contrary to the State's assertions, the Ninth Circuit's opinion in *Ford v. Hubbard* neither conflicts with the law of other circuits, nor the precedental opinions of this court. Accordingly, Ford respectfully requests this Court to deny the Warden's Petition in its entirety.

Respectfully submitted,



By Lisa M. Bassis,
Attorney for Respondent
Richard Herman Ford

**PROOF OF SERVICE**

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is P.O. Box 691956, Los Angeles, California, 90069.

On November 14, 2003, I served the foregoing document described as Opposition To The Petition For A Writ Of Certiorari on the interested persons and parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed described as follows:

Clerk, Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001

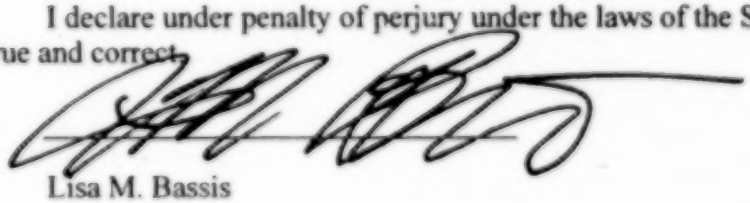
Bill Lockyer
Attorney General for the State of California
300 South Spring St.
Los Angeles, Ca. 90013

Richard Ford, E010539
CSP SAC A 3-223
P.O. Box 290066
Repressa Ca. 95671-0066

(BY MAIL) I caused such envelope as indicated on the attached service list with postage thereon fully pre-paid to be placed in the United States mail at Los Angeles, California.

Executed on November 14, 2003, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Lisa M. Bassis